

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

PATRICIA LYNN HOGUE  
AND BUDDY HUCKABY,

Plaintiffs,

v.

NO. 1:97CV63-S-D  
1:97CV148-S-D

RANDY ROBERTS, et al.,

Defendants.

OPINION

In this case, plaintiffs allege that defendants violated their Fourth Amendment rights, the federal wiretapping statute, and the common law tort of invasion of privacy in connection with certain wiretapping activities by the former sheriff. Presently pending are numerous motions for summary judgment. This opinion will address only the motion of Pontotoc County for summary judgment and the motions of United States Fidelity and Guaranty Insurance Company (USF&G) for summary judgment on its cross-claims.

FACTS

The facts are essentially undisputed. Plaintiff Patricia Lynn Hogue was employed as a secretary and office deputy in the Pontotoc County Sheriff's Department. In July, 1996, the estranged wife of defendant Randy Roberts, who was the sheriff of Pontotoc County, informed Hogue that Roberts had placed or caused to be placed a wiretap on Hogue's office telephone to determine whether she was campaigning for a rival candidate for the sheriff's office. During the

course of this conversation, Ms. Roberts described a telephone call between Hogue and plaintiff Buddy Huckaby which Roberts had recorded and played for his wife.

In response to this information, Hogue contacted an investigator with the district attorney's office who advised Hogue that he was aware of the allegations and another investigator was looking into the matter. Shortly thereafter, Hogue contacted the attorney for Pontotoc County who in turn advised the district attorney's office and the board of supervisors about Roberts' alleged wiretapping activities. The board president contacted Roberts, who denied any wrongdoing. Within days, the Federal Bureau of Investigation searched the Sheriff's Department and uncovered wiretapping equipment. In December, 1996, Roberts pled guilty to a charge of deprivation of rights under color of law pursuant to 18 U.S.C. § 242 in connection with his illegal recording of numerous telephone conversations involving Hogue and others within the department without their permission.

These suits ensued. In them, Hogue and Huckaby sued Roberts, individually; J. C. Aaron, the deputy who allegedly aided Roberts in placing the wiretaps, individually<sup>1</sup>; Pontotoc County, Mississippi; and USF&G, the surety on Roberts' and Aaron's bonds. In turn, USF&G cross-claimed against Roberts and Aaron for indemnification pursuant to provisions in the bond applications. Eventually, these causes were consolidated.

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<sup>1</sup>The procedural status of Aaron has been needlessly complicated by the inactivity of Huckaby and the cross-plaintiff USF&G. On April 28, 1998, the court, in cause number 1:97CV63 (*Hogue*), granted Hogue's motion for default judgment against Aaron for his failure to cooperate in discovery but reserved the determination of damages for trial. Although Aaron has not answered any complaint in *Huckaby*, cause number 1:97CV148, Huckaby has not requested an entry of default against him or the attendant default judgment. Furthermore, USF&G has received an entry of default against Aaron on its cross-claim in *Huckaby* but has not requested a default judgment. In *Hogue*, USF&G has taken no action against Aaron for his failure to answer the cross-claim.

## DISCUSSION

Presently before the court are multiple motions and cross-motions for summary judgment. The court begins with the motion of Pontotoc County for summary judgment.<sup>2</sup> Having carefully considered the matter, the court is of the opinion that the motion is well taken. With regard to the claims brought under section 1983, neither Hogue nor Huckaby can establish that Roberts' actions were taken in his role as the final policymaker for Pontotoc County in the area of law enforcement. Without dispute (and indeed, as alleged in the complaints), Roberts placed the illegal wiretap on Hogue's office phone to investigate matters related his reelection efforts. A different situation arises if Roberts had been investigating either Hogue or Huckaby for criminal activity; then, the county clearly would be liable, since in that scenario, Roberts' actions, although illegal, would be directly related to his official law enforcement duties. As it was, however, Roberts was not carrying out any official duties or otherwise acting as the county's final policymaker when he admittedly deprived Hogue and Huckaby of their constitutional rights. In that situation, the county cannot be held liable for Roberts' actions, and summary judgment is granted to the county on the section 1983 claim.

As to the county's request for summary dismissal of plaintiffs' state law claim for invasion of privacy, the court finds it is likewise well taken. The only way to impute liability to Pontotoc County for Roberts' actions is through a theory of vicarious liability or respondeat superior. Plaintiffs cannot succeed in that regard, as neither can show (1) that the county had actual or constructive knowledge of Roberts' activities, (2) that it implicitly or explicitly permitted the illegal

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<sup>2</sup>Though the motion is styled and presented as being against both plaintiffs, it was filed only in the *Hogue* case. Apparently, the parties believed the consolidation had been effected, but the agreed consolidation order which had been circulated among the parties was found by Huckaby's new attorney in his case file. It had never been forwarded to the court for filing.

acts, or (3) that Roberts was acting within the scope of his employment. As discussed previously, Roberts was clearly acting for his own personal and political reasons and not as the final law enforcement policymaker or the agent of Pontotoc County. Once the county attorney was told by Hogue of her suspicions, he immediately advised the district attorney and the board of supervisors. Plaintiffs have come forward with no evidence that questions this chain of events or places in issue any prior knowledge, actual or constructive, by the county of Roberts' activities. They certainly have come forward with nothing to suggest that the county authorized Roberts to act as he did. Pontotoc County is therefore entitled to summary judgment on this claim as well.

Finally, the court turns to plaintiffs' claims under 18 U.S.C. § 2511, which prohibits the conduct at issue here. Admittedly, plaintiffs seek to hold the county liable under the same theories as advanced under 1983 and state law. The court need not revisit these theories as they have been thoroughly discussed and rejected previously. For the reasons stated *supra*, Pontotoc County is entitled to summary judgment on this statutory claim as well.

The court next addresses the motions of USF&G for summary judgment on its cross-claims for indemnification against Roberts and Aaron. Neither has responded to the motions. Although this court cannot grant summary judgment by default, i.e., simply because there is no opposition to the motion, *Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985), the court may accept as undisputed the movant's version of the facts and grant the motion where the movant has made a prima facie showing of its entitlement to summary judgment. *Eversley v. Mbank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

In their applications for bonds with USF&G, Roberts and Aaron agreed to indemnify the company

against all loss, damages, claims, suits, costs, and expenses whatever. Including court costs and counsel fees...or liability therefor, which the Company may sustain or incur by reason of: executing or procuring said bond, or making its release or evidence thereof from same, or defending, prosecuting, or settling any claim, suit, or proceeding which may be brought or threatened by or against any of the undersigned or the Company in connection with same or any of the agreements herein contained....

In this court's view, this language clearly entitles USF&G to indemnification from Roberts and Aaron if it is found liable under plaintiffs' complaints. USF&G has therefore made a prima facie showing of its entitlement to summary judgment on its cross-claims.

### CONCLUSION

Having carefully considered the motion of Pontotoc County for summary judgment against Hogue and Huckaby, the court finds that there is no genuine issue of material fact and Pontotoc County is entitled to judgment as a matter of law on all claims filed against it. Furthermore, USF&G is entitled to summary judgment on its cross-claims for indemnification against Roberts and Aaron. An appropriate order shall issue. The remaining motions will be considered by separate opinion.

This \_\_\_\_\_ day of June, 1998.

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CHIEF JUDGE